

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANTHONY WAYNE JOHNSON,

Plaintiff,

vs.

M. GAINS, et al.,

Defendant.

CASE NO. 09cv1312-LAB (POR)

**ORDER ADOPTING REPORTS
AND RECOMMENDATIONS;**

**ORDER DENYING PLAINTIFF'S
MOTIONS FOR SUMMARY
JUDGMENT [DOCKET NUMBERS
66 AND 69]; AND**

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiff Anthony Johnson, a prisoner in state custody, brought this action pursuant to 42 U.S.C. § 1983. His claims stem from a pepper spraying incident and the use of force by prison officers. On April 8, 2011, Johnson moved for summary judgment. Then on April 14, 2011, he again moved for summary judgment on essentially the same grounds.

The motions were referred to Magistrate Judge Louisa Porter for report and recommendation pursuant to 28 U.S.C. § 636. Judge Porter issued two reports and recommendations, the first on July 15, 2011 addressing the first-filed motion, and the second on February 16, 2012 (collectively, the "R&Rs"). The R&Rs find the summary judgment standard is not met, and recommend denying Johnson's motions. Johnson has filed objections to both R&Rs.

///

1 A district court has jurisdiction to review a Magistrate Judge's report and
2 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). "The district judge must
3 determine de novo any part of the magistrate judge's disposition that has been properly
4 objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole or in part, the
5 findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). The
6 Court reviews de novo those portions of the R&R to which specific written objection is made.
7 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

8 Johnson's objections to the first R&R argue that the R&R overlooked the supposedly
9 undisputed fact that he had been pepper-sprayed and then left for two hours, that the motive
10 for doing this was improperly punitive. The first R&R did not overlook this, however, but
11 rather discussed it at length. The R&R assumed that Johnson could produce evidence
12 showing he was left handcuffed after being pepper sprayed, but pointed out Defendants
13 have also presented evidence that while Johnson's behavior made pepper-spraying him
14 necessary, and that while he was in the shower after being pepper sprayed, he belligerently
15 resisted them, making it impractical or impossible to uncuff him. Defendants also present
16 evidence that they gave him the opportunity to wash the pepper spray off, even though he
17 was still handcuffed.

18 The first R&R gives the wrong legal standard at one point. In considering Johnson's
19 argument that certain declarations are hearsay and thus inadmissible, the R&R says their
20 allegations are sufficient. (First R&R, 6:26–7:4.) This is incorrect; at the summary judgment
21 stage, Defendants are required to produce admissible evidence, and cannot rely on mere
22 allegations. *See Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019,
23 1033 n.14 (9th Cir. 2008). The Court has, however, reviewed the objected-to declarations
24 and finds they are not hearsay. The declarants in each case state they have personal
25 knowledge of the facts stated in the challenged declarations. (Carpio Decl., ¶ 1; Smith Decl.,
26 ¶ 1; Palomera Decl., ¶ 1; Garza Decl., ¶ 1.) The declarations state facts from the point of view
27 of a witness who saw or heard the events described. For instance, Palomera's declaration
28 says he observed Johnson being told to come out of the shower, refusing to do so, and

1 becoming aggressive and verbally abusive. (Palomera Decl., ¶ 2.) Palomera also says
2 observed Carpio telling Johnson to “cuff up,” and Johnson then refusing to do so and lunging
3 at Carpio. (*Id.*, ¶ 3.) Johnson’s charge that they don’t really have personal knowledge of
4 these facts is insufficient, because the Court does not weigh evidence at this stage. See
5 *Nolan v. Heald College*, 551 F.3d 1148, 1154 (9th Cir. 2009). The first R&R is therefore
6 **MODIFIED** to include this reasoning.

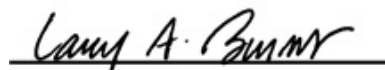
7 Johnson objects to the second R&R, saying it overlooked undisputed violations of his
8 Fourth Amendment and Eighth Amendment rights. The R&R, however, merely pointed out
9 that Johnson’s successive motion for summary judgment raised the same arguments and
10 should be denied for the same reasons as set forth in the earlier R&R. Because the first
11 R&R addresses these alleged violations, the objections have no merit.

12 The Court therefore **OVERRULES** Johnson’s objections to the R&Rs, **MODIFIES** the
13 first R&R as discussed above, and **ADOPTS** them as modified. Johnson’s motions for
14 summary judgment (docket nos. 66 and 69) are **DENIED**.

15 On February 27, 2012, Johnson filed a motion for an injunction requiring that he be
16 transferred to another prison. He argues this is required under Cal. Penal Code § 5068, and
17 that it will solve problems he has been experiencing concerning access to the prison law
18 library. The library issue was apparently addressed by Magistrate Judge Porter’s order of
19 February 24. The remaining issues are not before the Court, because the Fourth Amended
20 Complaint doesn’t seek any remedy under Cal. Penal Code § 5068, nor does this state
21 statute create any federally-protected interest the Court would have jurisdiction over. See
22 *Haywood v. Ramon*, 2012 WL 43612, slip op. at *4 (E.D.Cal., Jan. 9, 2012) (no federally-
23 protected liberty interest created by Cal. Penal Code § 5068). The motion for injunction
24 (docket no. 208) is therefore **DENIED**.

25 **IT IS SO ORDERED.**

26 DATED: March 6, 2012

27 

28 **HONORABLE LARRY ALAN BURNS**
United States District Judge